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Supreme Court of the United States

October Term, 1972

No. 72-450

UNITED STATES OF AMERICA,

Respondent/Plaintiff,

vs.

WILLIAM GROTH,

Petitioner/Defendant.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. .....

UNITED STATES OF AMERICA,

Respondent/Plaintiff,

vs.

WILLIAM GROTH,

Petitioner/Defendant.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

This is a Petition of WILLIAM GROTH for a Writ of Certiorari to review the Orders made by the United States Court of Appeals for the Ninth Circuit on May 14, 1973, denying Petitioner's appeal, and on August 9, 1973, denying Petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc, which appeal was sought to review the Order made by the United States District Court, Central District

of California, on July 25, 1972, convicting Petitioner of violations of Title 21 U.S.C. §§ 841(a)(1), 960(a)(1), and 963.

OPINIONS BELOW

To Petitioner's knowledge, there are no official or unofficial reports of (a) an Order Denying Petitioner's Motion for Continuance or the Order Denying Petitioner's Motion to Dismiss the Indictment Because the Government Supplied Contraband to Petitioner; (b) the Order entered on May 14, 1973 affirming Petitioner's convictions on all counts (a copy of said Order has been attached hereto as Appendix "A"); or (c) the Order filed by the United States Court of Appeals for the Ninth Circuit on August 9, 1973 denying Petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc (a copy of said Order has been attached hereto as Appendix "B").

JURISDICTION

1. Petitioner filed a Motion to Dismiss the Indictment Because the Government Supplied Contraband to Petitioner, in the United States District Court, Central District of California, and a Motion for Continuance so that Counsel for Petitioner could go to India to interview the Alleged Co-conspirator.

2. The United States District Court, Central District of California, denied Petitioner's Motion to Dismiss on June 2, 1972 (a copy of said Opinion has been attached hereto as Appendix "C"), and Petitioner's Motions for

Continuance on June 30 and July 5, 1972; Petitioner was convicted on all counts of the Indictment on July 25, 1972, and a timely Notice of Appeal was filed on that date.

3. On May 14, 1973, Petitioner's conviction was affirmed by the Court of Appeals for the Ninth Circuit.

4. On June 4, 1973, the Court of Appeals for the Ninth Circuit denied Petitioner's Application for Stay of Mandate.

5. On August 9, 1973, Petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc was denied by the Court of Appeals for the Ninth Circuit.

6. On August 24, 1973, Petitioner mailed an Application for Stay of Mandate to this Honorable Court.

7. There have been no motions for extension of time within which to file this Petition for Writ of Certiorari.

8. The jurisdiction of this Court is invoked under Title 28, U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether Mr. Groth was denied Due Process of Law when the Government obtained contraband in India and imported same into the United States by diplomatic passport with the cooperation of the United States Bureau of Customs and the United States Bureau of Narcotics and Dangerous Drugs; contacted Petitioner in California to arrange a meeting; and then, upon delivery of the contraband, convicted him for possession with intent to distribute, importation and conspiracy to import said contraband?

2. Whether Mr. Groth was denied Due Process of Law when the trial judge refused to allow a continuance so that

counsel for Mr. Groth could fly to India to take the deposition of the alleged co-conspirator, Mr. Kapoor, Jr., so that Mr. Groth would be able to effectively confront and cross-examine the principal Government witness, Mr. Burke, who testified about alleged conversations Mr. Kapoor, Jr., had with Mr. Burke in India?

3. Whether there was insufficient evidence of a conspiracy to allow the out-of-court, unsworn statements of Mr. Kapoor, Jr., into evidence against Mr. Groth?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are set forth in Appendix "D"; they are:

Fifth and Sixth Amendments to the United States Constitution.

STATEMENT OF FACTS

Agent Burke (Bureau of Narcotics and Dangerous Drugs) went to India to investigate the importation of the contraband into the United States by diplomatic couriers. In India, Burke was introduced to a Mr. Kapoor, Jr., and a discussion was initiated about smuggling contraband. Burke mentioned to Kapoor, Jr., that he would be traveling to New York in the hope that Kapoor, Jr., would be interested in smuggling contraband into the United States. Burke also suggested that he could successfully smuggle articles into the United States because he possessed a diplomatic passport. On cross-exam-

ination, Burke admitted that he solicited Kapoor, Jr., to smuggle articles into the United States. Kapoor, Jr., gave hashish to Burke, and Burke brought the hashish into the United States with the cooperation of the Indian Government, the United States Bureau of Customs and Bureau of Narcotics and Dangerous Drugs. Burke then contacted Petitioner in California and told Petitioner to meet him the next day at Los Angeles International Airport. During this conversation Burke told Petitioner how much the hashish would cost. The next day Petitioner met Burke at the airport, exchanged money for the hashish, and was thereupon arrested by federal agents.

REASONS FOR GRANTING THE WRIT

Petitioner contends he was denied Due Process of Law when the Government introduced into evidence against Petitioner contraband that the Government supplied to Petitioner. Specifically, Petitioner contends that this Court should take this opportunity to clarify *United States v. Russell*, ... U.S. ....., 93 S. Ct. 1637 (1973), and determine whether the Government can introduce into evidence against an accused contraband that the Government supplied to the accused.

Petitioner also requests that this Court seize upon this opportunity to give guidance to the Circuit Courts on what standards to apply to a request for a continuance by an accused, and petitioner further requests that this Court take the opportunity to review the so-called "conspiracy exception" to the hearsay rule which allows unsworn, out-of-court declarations to be introduced in court for the truth

of the matter asserted, in light of *Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620 (1968). Specifically, Petitioner requests that this Court review the rule that allows hearsay statements to be introduced into evidence *before* a prima facie case of conspiracy is established. This rule should also be reviewed in light of the facts of the instant case where the unsworn, out-of-court declarations of the alleged co-conspirator were allowed into evidence through the testimony of the Government's witness without the appearance at trial of said alleged co-conspirator. Under these circumstances Petitioner was unable to effectively confront and cross-examine the witnesses against him, because the co-conspirator was not present to testify as to what was said in India and there was no one else privy to these alleged conversations who could effectively cross-examine the Government's witness about these statements. For these reasons, Petitioner was effectively denied his rights guaranteed by the Sixth Amendment to the United States Constitution.

ARGUMENT

I

Mr. Groth Was Denied Due Process Of Law When Contraband Supplied By The Government Was Introduced Into Evidence Against Him.

Petitioner contended in both the District Court and the Court of Appeals that he was entrapped as a matter of law. On May 14, 1973, the Court of Appeals for the Ninth Circuit affirmed Petitioner's conviction, relying upon

United States v. Russell, ... U.S. ....., 93 S. Ct. 1637 (1973). It is respectfully submitted that the Appellate Court's reliance was misplaced. Justice Rehnquist, speaking for a divided court, said in *Russell, supra:*

> "While we may someday be presented with a situation in which the conduct of law enforcement agents is so outrageous that Due Process principles would absolutely bar the Government from invoking judicial processes to obtain a conviction, *cf. Rochin v. California,* 242 U.S. 165, 72 S. Ct. 205, 96 L. Ed. 186 (1952), the instant case is distinctly not of that breed . . . . *The chemical is by itself a harmless substance and its possession is legal.*" (Emphasis added. 93 S. Ct. at 1643.)

The aforementioned language in no way allows the Government to supply contraband to an accused and then arrest him for its possession.[1]

The evidence adduced at the trial court clearly established the impermissible Government activity referred to by Justice Rehnquist in *Russell, supra.* The evidence was as follows:

---

[1]It would seem to go without saying that the acts of a law enforcement official in attempting to induce individuals to import a drug when the agent actually supplies the contraband would prohibit a conviction for conspiracy, importation, or possession even under *Russell, supra.* At pages 4 and 5 of *Russell, supra,* the Court mentions *United States v. Bueno,* 447 F.2d 903 (5th Cir. 1971), and *United States v. Chisum,* 312 F. Supp. 1307 (C.D. Cal. 1970). In these cases the Government actually supplied contraband to the defendant. *Russell, supra,* does not overrule these cases. These cases are still valid authority for the proposition that the Government cannot supply contraband to a citizen and then prosecute the citizen. In fact, *Russell, supra,* emphasized the fact that the chemical supplied by the agent was harmless by itself and its possession was legal. For this reason Petitioner contends that *Russell, supra,* is inappropriate to the issues in his case and that *Bueno, supra,* and *Chisum, supra,* require that his conviction be reversed.

1. Agent Burke went to New Delhi, India, to attempt to meet Mr. Kapoor;

2. Mr. Burke gave Mr. Kapoor the impression that he would engage in illegal activities;

3. Mr. Burke suggested that he could successfully smuggle articles into the United States by use of his diplomatic passport and thereby solicited Kapoor to smuggle articles into the United States;

4. Agent Burke made the arrangements to bring the contraband into the United States by contacting the United States Customs and Bureau of Narcotics and Dangerous Drugs agents in the United States;

5. Agent Burke received permission from the Indian Government to leave India with the hashish;

6. Agent Burke was told exactly how to act when he went through Customs and he was told that he would be cleared through Customs; and

7. Agent Burke told Mr. Groth that he was bringing contraband to him and how much money the contraband would cost.

Petitioner contends that *United States v. Bueno*, 447 F.2d 503 (5th Cir. 1971), and *United States v. Chisum*, 312 F. Supp. 1307 (C.D. Cal. 1970), prohibit the Government from supplying an illegal drug and then prosecuting for possession of same. The lower court felt that this Court's decision in *Russell, supra*, has overruled these cases. It is respectfully requested that this Honorable Court specifically decide whether the rule of law stated in *Bueno* and *Chisum* is still viable authority.

II

Mr. Groth Was Denied Due Process Of Law When The Trial Judge Refused To Grant A Continuance To Allow Counsel For Petitioner To Travel To India To Take The Deposition Of The Alleged Co-conspirator, Mr. Kapoor, Jr.

Petitioner Groth was indicted on March 22, 1972, and his trial commenced on July 5, 1972. On June 30, 1972, the trial court denied Petitioner's counsel's Motion for Continuance to go to New Delhi, India, to obtain the deposition of Mr. Kapoor, Jr. Counsel for Petitioner indicated that Petitioner had attempted to obtain the necessary funds ($2,500) so counsel could obtain Mr. Kapoor's deposition; that other methods of obtaining Mr. Kapoor's testimony had been investigated by counsel but no reasonable alternatives to the deposition had been discovered; and that the testimony of Mr. Kapoor was absolutely critical to the defense because it would show that Mr. Groth did not know Mr. Kapoor, Jr., and was not involved in a conspiracy with Kapoor to import hashish. The Motion to Take a Deposition of Mr. Kapoor, Jr., was granted but the Motion for Continuance was denied. (The trial judge stated that he realized the deposition could not be taken in time when he granted the Motion but denied the Continuance.)

On July 5, 1972, counsel for Petitioner again moved for a continuance to obtain the testimony of Mr. Kapoor. In his affidavit counsel alleged that he had contacted the United States Department of Immigration and Naturalization and learned that certain shots and innoculations were necessary before he could travel to India; he contacted the

Los Angeles County Health Department and was informed that certain innoculations required several stages and a one-month time period was recommended, but in any event a one-week interval was necessary between the first innoculation and the second innoculation; counsel was further informed by his family doctor that the innoculations could not be given in less than a one-week time period because of the possibility of serious medical complications.

Petitioner contacted Pan American Airlines and learned that the fastest flight from Los Angeles to New Delhi, India, would take approximately 24 hours, one way. Based upon the foregoing information, it was concluded by Petitioner's counsel that it was impossible to obtain the deposition of Mr. Kapoor in the one-week period before trial.

The requested continuance would have been for approximately one month to allow Petitioner's counsel to obtain the proper innoculations, to make arrangements to fly to India, to take the deposition of Mr. Kapoor, and to return to Los Angeles; Petitioner's counsel had not requested any previous continuances and, in fact, the only continuance granted was granted to the Government; there would have been little, if any, inconvenience to the Court in delaying the trial, because there was only one major witness for the Government, Mr. Burke, and he was not yet in Los Angeles at the time the continuance was requested; the delay was clearly for legitimate purposes because Mr. Kapoor's testimony would have absolved Mr. Groth of any involvement in the alleged conspiracy to smuggle hashish; and, finally, the delay was not for dilatory reasons. *Counsel further represented to the Court that Petitioner had only recently been able to obtain sufficient funds to allow*

counsel to travel to India to obtain Mr. Kapoor's deposition. The refusal of the trial court to permit the continuance in this instance amounted to an abuse of discretion and denied Petitioner his Fifth Amendment rights to due process of law. *Gicallone v. Lucas,* 445 F.2d 1238 (6th Cir. 1971), *cert. den.* 405 U.S. 922; *United States v. White,* 324 F.2d 814 (2d Cir. 1963).

Petitioner's counsel has been unable to locate any case upholding the denial of a continuance when Petitioner was brought to trial within three months of the Indictment charging him with the offense. This Court should take this opportunity to clarify the standards to be applied in the United States District Courts for the granting or denial of a continuance. This Court should affirmatively state that a delay of 70 days from Arraignment to Trial is not so unreasonable as to deny a continuance when legitimate reasons are presented for the granting of the continuance, when the continuance will be used to obtain critical information to insure that the accused receives a fair trial, and where the Government would not be prejudiced by the continuance.

III

There Was Insufficient Independent Evidence To Allow The Hearsay Statements Of Agent Burke And Mr. Kapoor, Jr., Into Evidence Against Petitioner.

An overwhelming percentage of the evidence introduced against Mr. Groth at trial consisted of hearsay statements allegedly made by Kapoor, Jr., in India to Agent Burke. These statements were allowed into evidence against Mr. Groth without

the Government first being required to prove a prima facie case of conspiracy. In fact, it is Petitioner's contention that a prima facie case of conspiracy was not made out. *United States v. Geaney*, 417 F.2d 1116, 1120 (2d Cir. 1969), *cert. den.* 397 U.S. 1028.

This situation in Mr. Groth's trial was even more unconscionable than the situation in the usual conspiracy case. In the usual conspiracy trial the conspirator who allegedly made the statement in furtherance of the conspiracy is a defendant at the trial. This permits the defendant to testify as to the truth or falsity of the alleged statements made by him or, he can at least advise his attorney as to what was in fact said so that his attorney can cross-examine the witness with these facts in mind. In the instant prosecution, neither Mr. Kapoor, Jr., nor a representative of Mr. Kapoor, Jr., was available to cross-examine Agent Burke on the alleged statements made to him. Because of this, alleged statements by Mr. Kapoor, Jr., not made under oath were introduced into evidence for the truth of the matter asserted without any effective means of cross-examining Agent Burke as to what Mr. Kapoor said. This practice clearly seems to contravene the letter and spirit of the Sixth Amendment. *Bruton v. United States, supra.* For this reason Petitioner requests that this Court take this opportunity to review the so-called "conspiracy" exception to the hearsay rule.

CONCLUSION

For the foregoing reasons, Petitioner respectfully submits that this Petition for Writ of Certiorari should

be granted and that the issues herein presented be given plenary consideration by this Honorable Court.

Respectfully submitted,

VICTOR SHERMAN, of

NASATIR, SHERMAN & HIRSCH

Attorneys for Petitioner

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APPENDIX "A"

ORDER OF AFFIRMANCE

In the United States Court of Appeals for the Ninth Circuit.

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. WILLIAM GROTH, Defendant-Appellant.

No. 72-3169.

[Filed May 14, 1973]

Appeal from the United States District Court for the Central District of California.

Before: HUFSTEDLER and WRIGHT, Circuit Judges, and NIELSEN, District Judge.*

United States v. Russell, ... U.S. ..... (April 24, 1973), compels affirmance of the conviction.

AFFIRMED.

*Of the Southern District of California

ORDER
(Denying Petition for Rehearing, etc.)

In the United States Court of Appeals for the Ninth Circuit.

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. WILLIAM GROTH, Defendant-Appellant.

No. 72-3169.

[Filed August 9, 1973]

Before: HUFSTEDLER and WRIGHT, Circuit Judges, and NIELSEN, District Judge.*

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

*Southern District of California, sitting by designation.

ORDER DENYING MOTION TO SUPPRESS

In the United States District Court, Central District of California.

UNITED STATES OF AMERICA, Plaintiff, vs. WILLIAM GROTH, KAPOOR, JR., Defendants.

No. 9952-CD-DWW.

[Filed June 2, 1972]

Defendant William Groth and one Kapoor are jointly charged in the first two counts of a three-count indictment with conspiring to import, and importing a controlled substance (hashish) into the United States from India. A third count charges Groth with possessing the hashish with intent to distribute. Groth moves for the suppression of the evidence seized upon the ground he was a victim of entrapment as a matter of law. He views this as a situation wherein the contraband was furnished him by an agent of the Government and contends that the transaction could not have been completed without the active aid of the Government. *United States v. Chisum*, 312 F. Supp. 1307 (C.D. Cal. 1970); see also *United States v. Russell* (9th Cir. Slip Opinion 26, 485 Apr. 6, 1972).

In the *Chisum* case the Government learned that defendant was trying to buy counterfeit money and supplied him the money through undercover agents and then arrested him for receiving it. This was held to be entrapment as a matter of law. Groth's reliance upon *Chisum* is misplaced.

In order to establish the defense of entrapment defendant must show a lack of any criminal predisposition on his part and zealous activity on the part of law enforcement

which overreaches normal bounds of investigation. The facts of this case do not show such involvement on the part of the Government.

Terrence Burke is a special agent of the Bureau of Narcotics and Dangerous Drugs assigned to Afghanistan. While posing as a diplomatic courier for the United States he met co-defendant Kapoor in New Delhi, India.[1] Kapoor urged Burke to use his diplomatic passport to aid Kapoor to smuggle narcotics through customs and into the United States and offered to see that Burke would be paid for delivering opium to a man in Los Angeles whom he described as a "Mr. Shoe." Kapoor told the agent to use a certain telephone number to contact "Mr. Shoe" when he arrived in Los Angeles and he gave Burke a torn one-half of a Pakistan ten Rupee note and explained that "Mr. Shoe" would have the other one-half of the note which he would produce to identify himself at their meeting. If the two halves matched Burke was told to give the contraband to "Mr. Shoe", receive $6000 from him, retain $3750 for himself and forward the balance to a third person in Germany that later turned out to be a relative of Kapoor. Burke was then taken to Kapoor's auto and given a suitcase which contained 19 plastic bags of hashish which he was to carry to Los Angeles. It was not explained why Kapoor originally asked Groth [*sic*] to carry opium but later gave him a suitcase containing hashish instead.

When Burke and Kapoor parted, Burke completed a pre-arranged visit to the police in India where the contraband was inspected and tested and then he travelled to the

---

[1] While named a co-defendant and co-conspirator in this case, Kapoor is not before this Court and is in custody in India.

United States through New York with the suitcase and then on to Los Angeles. He called the telephone number he had been given and talked to a man who identified himself as "Mr. Shoe" and after discussing an exchange of packages between themselves, made arrangements to meet at Los Angeles the next day. "Mr. Shoe" told Burke what he would be wearing and that he would be carrying a brown attache case; they were to meet at the TWA ticket counter.

The agent presented himself at the appointed place at the time agreed upon and he was approached by defendant Groth who met the description given Burke on the telephone and who identified himself as "Mr. Shoe." Defendant explained that he had not yet received the other half of the Rupee note but he had other identification including a letter from New Delhi. Burke and Groth discussed proposed future smuggling ventures and Groth stated that he understood that Burke was bringing him hashish rather than opium. Burke then delivered the hashish to defendant and received the $6000 from him and at a given signal defendant was arrested.

The cases cited by defendant in support of the motion involve the Government initially furnishing contraband which finds its way into the hands of the defendant. There was no such participation in this case. The hashish was not supplied to Kapoor by a government agent; nor did that agent suggest to Kapoor the idea of obtaining it. Kapoor was clearly the furnisher and his contacts with Groth were established before Kapoor met Burke. It was Burke's supposed position as an errant diplomatic courier that attracted Kapoor and seemed to solve his problem of how to get his contraband through customs. Here the government seems to play no more important role than it does when it intercepts

contraband traveling through the mail and uses its postal personnel to facilitate the delivery of the package to the addressee. The illegal importation of hashish could not have been carried out absent Groth's predisposition to acquiring the contraband from Agent Burke. Groth was not entrapped by a government agent who acted merely as a conduit. Accord *United States v. Gould*, 419 F.2d 825 (9th Cir. 1969), *McClain v. United States*, 417 F.2d 489 (9th Cir. 1969).

The motion is denied.

DATED: This 2nd day of June, 1972.

DAVID W. WILLIAMS,
United States District Judge

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V [1791]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI [1791]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

STATE OF CALIFORNIA)
) ss.
County of Orange)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Orange, State of California, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 326½ Main Street, Huntington Beach, California 92648, that on SEPTEMBER 6, 1973, I served the within PETITION FOR WRIT OF CERTIORARI (UNITED STATES OF AMERICA vs. WILLIAM GROTH) on the following named parties by depositing the designated copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Huntington Beach, California, addressed to said parties at the addresses as follows:

UNITED STATES ATTORNEY
FOR THE CENTRAL DISTRICT OF CALIFORNIA
12TH FLOOR - U. S. COURTHOUSE
LOS ANGELES, CALIFORNIA 90012 — Two copies.

SOLICITOR GENERAL
UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, D. C. 20530 — Three copies.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on SPETEMBER 6TH, 1973, at HUNTINGTON BEACH, CALIFORNIA.

D. A. Standefer

Dean-Standefer, 326½ Main St., Huntington Beach, Ca. 92648
(714) 536-7161

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SUPREME COURT, U. S.

No. 73-450

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In the Supreme Court of the United States

OCTOBER TERM, 1973

WILLIAM GROTH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-450

WILLIAM GROTH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the facts established entrapment as a matter of law, that the trial court improperly denied a continuance to permit petitioner to travel to India to take a deposition, and that the court improperly admitted statements made by a co-conspirator.

After a jury trial in the United States District Court for the Central District of California, petitioner was convicted of conspiracy to import and of importing hashish with intent to distribute, in violation of 21 U.S.C. 963, 960(a)(1), and 841(a)(1). He was sentenced to four years' imprisonment on each count, the sentences to run concurrently. The court of appeals affirmed (Pet. App. A).

The facts show that Terrence Burke, a special agent of the Bureau of Narcotics and Dangerous Drugs posing as a diplomatic courier for the United States, met co-

defendant Kapoor[1] in New Delhi, India (Tr. 192-197).[2] Prior to meeting with Kapoor, Agent Burke had been informed by a member of the German Embassy that Kapoor was using diplomatic couriers to smuggle narcotics into the United States (Tr. 321-325). Kapoor asked Burke to use his diplomatic passport to smuggle narcotics to a man in Los Angeles (Tr. 197-201, 335, 345-348). Kapoor told the agent to use the name "Mike Sullivan" and to call a certain telephone number and speak with "Mr. Shoe" (Tr. 202-203). He gave the agent a torn half of a Pakistani ten rupee note, which would identify the agent to the man in Los Angeles, to whom Kapoor was sending the other half of the note (Tr. 201-202). Burke was to give the narcotics to "Mr. Shoe," retain a portion of the money received, and send the balance to a third person in Germany (Tr. 199-201, 345-348). Kapoor then gave Burke a suitcase containing hashish (Tr. 199-201, 345-348).

Once in Los Angeles, Burke called the telephone number he had been given, identified himself as "Mike Sullivan" to a man who identified himself as "Mr. Shoe," and made arrangements for a meeting the next day (Tr. 216-217).[3] At the appointed place and time, petitioner walked up to Burke, identified himself as "Mr. Shoe," and asked the agent if he was "Mike Sullivan" (Tr. 220-221). In response to the agent's

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[1] Kapoor was indicted as a co-defendant and co-conspirator in this case but was not before the court, because he was in custody in India.

[2] "Tr." refers to the trial transcript.

[3] A recording of this conversation was played for the jury (Tr. 280-291) and a transcript introduced into evidence (Tr. 281). It was stipulated that the telephone number was registered to petitioner (Tr. 295-296).

question about his ability to distribute hashish, petitioner stated that he had received 300 pounds of hashish in January from New Delhi (Tr. 222). When asked if he had received the half of the ten rupee note, petitioner replied that he had not, but stated that he had received a telegram that morning from New Delhi informing him that "Mike Sullivan" was coming and that he was to accept delivery from him (Tr. 222-223, 229). To further prove that he was the intended recipient of the hashish, petitioner showed Burke a letter from New Delhi stating that "a lieutenant was bringing a load to him" (Tr. 223, 234-237, 259-260, 274-277). Petitioner also showed the agent a passport which indicated that petitioner had been to India about two months before (Tr. 244, 259-261) and stated that he handled all the money transactions for the India "group" (Tr. 224-225). Burke then delivered the hashish to petitioner and received money from him. At a given signal, petitioner was arrested (Tr. 229-230).

1. Petitioner contends that the facts establish entrapment as a matter of law. However, the fact that officers of the government merely afford opportunities or facilities for the commission of an offense does not establish entrapment. *United States* v. *Russell,* 411 U.S. 423; *Sherman* v. *United States,* 356 U.S. 369; *Sorrells* v. *United States,* 287 U.S. 435. Entrapment occurs "when the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute." *Sorrells, supra,* 287 U.S. at 442. The evidence here shows that petitioner and Kapoor had already formed a conspiracy to smuggle drugs into the United

States before agent Burke entered the scene.[4] Burke merely afforded the means for petitioner and Kapoor to commit the offense which they had already planned. Petitioner cites *United States* v. *Bueno*, 447 F. 2d 903 (C.A. 5), and *United States* v. *Chisum*, 312 F. Supp. 1307 (C.D. Cal.), for the proposition that the government cannot supply an illegal drug and then prosecute for possession of the drug (Pet. 8). Whatever the vitality of those rulings in light of *Russell*, agent Burke did not in fact supply the hashish. The hashish was supplied by Kapoor, to be delivered to petitioner by Burke. Petitioner was not entrapped by an agent who acted merely as a conduit. See *Corcoran* v. *United States*, 427 F. 2d 16 (C.A. 9); *United States* v. *Knight*, 411 U.S. 979.

2. Petitioner claims that the court abused its discretion in refusing to grant a continuance to allow petitioner to take the deposition of Kapoor in India. However, when a continuance is sought to obtain the testimony of a witness, the defendant must show that the witness can probably be obtained if the continuance is granted and that due diligence has been used to obtain the testimony on the day set for trial. *Leino* v. *United States*, 338 F. 2d 154 (C.A. 10), *Babb* v. *United States*, 210 F. 2d 473 (C.A. 5). Here, petitioner was not diligent. He was indicted on March 22, 1972, and trial did not commence until July 5, 1972. Petitioner thus waited three and a half months without acting to obtain Kapoor's deposition. Moreover, petitioner did not show that Kapoor would have agreed to testify.

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[4] In fact, at that time petitioner and Kapoor had already committed the crime of conspiracy to import drugs, although it was necessary for Burke to act as courier to discover the identity of "Mr. Shoe."

As a co-defendant, Kapoor could not have been compelled to testify, and it is likely he would have chosen not to incriminate himself. See *Babb* v. *United States, supra.* Under these circumstances, it was not an abuse of discretion to deny the continuance.[5]

3. Petitioner contends that the court erred in admitting the hearsay statements of co-conspirator Kapoor. Hearsay declarations made by one co-conspirator in furtherance of the conspiracy are admissible against all co-conspirators. *Dutton* v. *Evans,* 400 U.S. 74. However, before they can be used against the co-conspirator, the trial judge must determine, based on the independent evidence, that a *prima facie* case of conspiracy has been established. *Carbo* v. *United States,* 314 F. 2d 718 (C.A. 9), certiorari denied, 377 U.S. 953. That was done here. The independent evidence showed that petitioner used the code name "Mr. Shoe"; stated that he had received a telegram from India to expect "Mike Sullivan"; showed the agent a letter relating to the smuggling of narcotics from India; showed the agent a passport indicating that he had recently been to India; stated that he had previously received hashish from India; and said that he handled the money transactions for the India group.

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[5] Petitioner's reliance on *Giacalone* v. *Lucas,* 445 F. 2d 1238 (C.A. 6), certiorari denied, 405 U.S. 922, and *United States* v. *White,* 324 F. 2d 814 (C.A. 2) (Pet. 11), is misplaced. In *Giacalone,* the trial court refused to grant a continuance while the defendant's chief counsel was in the hospital, and the case was tried by associate counsel. In *White,* the missing witness was a government informant who, according to the defendant's testimony, requested the narcotics for himself and a friend because they were both "sick." Here, the unavailable witness was a co-conspirator who did not play an immediate role in the dealings between petitioner and Burke.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1973.